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**No. 89-624**

**Supreme Court, U.S.  
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**IN THE  
Supreme Court of the United States**

**October Term, 1989**

**MAISLIN INDUSTRIES, U.S., INC., ET AL.,**  
*Petitioners,*

**v.**

**PRIMARY STEEL, INC.,**  
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR RESPONDENT**

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**April 4, 1990**

**COUNTERSTATEMENT OF QUESTION  
PRESENTED FOR REVIEW**

Whether the Interstate Commerce Commission, in exercising its primary jurisdiction under 49 U.S.C. §10701(a), may determine that it is an unreasonable practice for a motor carrier to collect higher charges from a shipper after negotiating the originally charged rate and representing to the shipper that the negotiated rate was properly published with the Interstate Commerce Commission, and whether such a determination by the Interstate Commerce Commission may be relied upon by a court.

## PARTIES TO THE PROCEEDING BELOW

Appellants in the United States Court of Appeals for the Eighth Circuit, and Petitioners herein, are Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the United States Court of Appeals for the Eighth Circuit, and Respondent herein, is Primary Steel, Inc.\* The Interstate Commerce Commission was permitted to intervene as a party to the proceeding below in support of the Appellee.

\* The parent companies of Primary Steel, Inc. are International Affiliates & Partners; Golodetz Corporation; Golodetz Trading Corp.; and Primary Industries Corporation.

## TABLE OF CONTENTS

	Page
Counterstatement Of Question Presented For Review .....	i
Parties To The Proceeding Below .....	ii
Table Of Contents .....	iii
Table Of Authorities .....	v
Opinions Below.....	1
Jurisdiction.....	2
Statutes Involved.....	2
Counterstatement Of The Case .....	3
Summary Of Argument.....	8
Argument .....	9
1. The Court Of Appeals Correctly Found That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) To Determine The Reasonableness Of A Motor Common Carrier's Billing Practices .....	9
A. The Interstate Commerce Commission Proceeding.....	9
B. The Interstate Commerce Commission's Determination That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) In Determining The Validity Of Undercharges Was Fully Supported By Precedent.....	15

2. The Determination Of The Reasonableness Of The Petitioners' Billing Practice Under 49 U.S.C. §10701(a) Is Within The Interstate Commerce Commission's Primary Jurisdiction.....	21
3. The Interstate Commerce Commission's Decision Is A Reasonable Accommodation Between Competing Sections Of The Interstate Commerce Act .....	23
4. The Statutory Provisions Of The Interstate Commerce Act Permit The Interstate Commerce Commission's Consideration Of The Unreasonable Practices Provision Of 49 U.S.C. §10701(a) .....	25
Conclusion.....	30

## TABLE OF AUTHORITIES

## CASES

<i>American Trucking Ass'ns, Inc. v. Atchinson, Topeka &amp; Santa Fe Ry. Co.</i> , 387 U.S. 397, 87 S.Ct. 1608 (1967).....	26
<i>Buckeye Cellulose Corp. v. Louisville &amp; Nashville R.R. Co.</i> , 1 I.C.C.2d 767 (1985) .....	15,27
<i>Carriers Traffic Serv. v. Anderson, Clayton &amp; Co.</i> , 881 F.2d 475 (7th Cir. 1989).....	18,22
<i>Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778 (1984) .....	25
<i>Darling v. Bowen</i> , 878 F.2d 1069 (8th Cir. 1989) ....	24
<i>Delta Traffic Service v. Appco Paper &amp; Plastics</i> , 893 F.2d 472 (2nd Cir. 1990) .....	22
<i>General American Tank Car Corp. v. El Dorado Terminal Co.</i> , 308 U.S. 422, 60 S.Ct. 325 (1940) ...	21
<i>General American Transp. Corp. v. I.C.C.</i> , 872 F.2d 1048 (D.C. Cir. 1989), suggestion for rehearing <i>en banc</i> denied, 883 F.2d 1029 (1989), cert. denied on February 20, 1990.....	25
<i>Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.</i> , 371 U.S. 84, 83 S.Ct. 157 (1962) .....	27,28
<i>INF Ltd. v. Spectro Alloys Corp.</i> , 881 F.2d 546 (8th Cir. 1989) .....	18,19,22, 23,24,25
<i>Intercity Transp. Co. v. United States</i> , 737 F.2d 103 (D.C. Cir. 1984) .....	25
<i>Iowa Beef Processors v. Ill. Central Gulf R. Co.</i> , 685 F.2d 255 (8th Cir. 1982) .....	22
<i>Jarecki v. G. D. Searle &amp; Co.</i> , 367 U.S. 306, 81 S.Ct. 1579 (1961) .....	24
<i>Louisville &amp; Nashville R.R. Co. v. Maxwell</i> , 237 U.S. 94, 35 S.Ct. 494 (1915) .....	15,19,20

<i>Marathon Oil Co. v. United States</i> , 807 F.2d 759 (9th Cir. 1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1593 (1987) .....	26
<i>Matter of Caravan Refrigerated Cargo, Inc.</i> , 864 F.2d 388 (5th Cir. 1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, sub nom., <i>Supreme Beef Processors, Inc. v. Yaquinto</i> .....	19,22
<i>Montana-Dakota Utilities Co. v. Northwestern Public Service Co.</i> , 341 U.S. 246, 71 S.Ct. 692 (1951) .....	27
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290, 96 S.Ct. 1978 (1976) .....	21
<i>National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates</i> , 3 I.C.C.2d 99 (1986) . . . . .	passim
<i>National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates</i> , 5 I.C.C.2d 623 (1989) . . . . .	passim
<i>Pennsylvania R.R. Co. v. United States</i> , 363 U.S. 202, 80 S.Ct. 1131 (1960) .....	17
<i>Purolator Courier Corp. v. I.C.C.</i> , 598 F.2d 225 (D.C. Cir. 1979) .....	28
<i>Regular Common Carrier Conference v. United States</i> , 793 F.2d 376 (D.C. Cir. 1986) .....	19
<i>Seaboard System R.R., Inc. v. United States</i> , 794 F.2d 635 (11th Cir. 1986) .....	passim
<i>Square D Co. v. Niagara Frontier Tariff Bureau</i> , 476 U.S. 409, 106 S.Ct. 1922 (1986) .....	19,20
<i>Standard Brands, Inc. v. Central R.R. of N.J.</i> , 350 I.C.C. 555 (1974) .....	18
<i>Thermofil, Inc. v. Jones Transfer Company</i> , 355 I.C.C. 828 (1977) .....	11
<i>T.I.M.E., Inc. v. United States</i> , 359 U.S. 464, 79 S.Ct. 904 (1959) .....	27,28
<i>Trans Alaska Pipeline Rate Cases</i> , 436 U.S. 631, 98 S.Ct. 2053 (1978) .....	24

<i>United States v. Turkette</i> , 452 U.S. 576, 101 S.Ct. 2524 (1981) .....	24
<i>United States v. Western Pacific R.R. Co.</i> , 352 U.S. 59, 77 S.Ct. 161 (1956) .....	21,23
<i>Western Coal Traffic League v. United States</i> , 719 F.2d 772 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 953, 104 S.Ct. 2160 (1984) .....	26
<i>West Coast Truck Lines, Inc. v. Weyerhaeuser Co.</i> , 893 F.2d 1016 (9th Cir. 1990) .....	18,22,24,25
<i>Western Transp. Co. v. Wilson &amp; Co., Inc.</i> , 682 F.2d 1227 (7th Cir. 1982) .....	15,22

## STATUTES

49 U.S.C. §10701(a) .....	passim
49 U.S.C. §10704(a)(1) .....	15
49 U.S.C. §10704(b)(1) .....	28
49 U.S.C. §10761(a) .....	passim
49 U.S.C. §11705(b)(3) .....	28
49 U.S.C. §11705(c)(1) .....	28
49 U.S.C. §11706(c)(2) .....	28

## MISCELLANEOUS

<i>Motor Carrier Act of 1980</i> , Pub. L. 96-296, 94 Stat. 793, July 1, 1980 .....	5,16
Pub. L. 95-473, 92 Stat. 1337, October 17, 1978 ....	28
Pub. L. 89-170, 79 Stat. 651, September 6, 1965 ....	27,28
H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2927 .....	28
Historical Revision Notes, following 49 U.S.C. §10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98 .....	28
Former Section 304(a), Interstate Commerce Act ...	28
49 C.F.R. §1111.1 .....	4

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**BRIEF FOR RESPONDENT**

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (8th Cir. 1989), and is reprinted as Appendix A (1a-13a) to the Petition For Writ of Certiorari.

The memorandum and order of the United States District Court for the Western District of Missouri, Western Division, granting summary judgment for the Respondent is reported at 705 F.Supp. 1401 (W.D. Mo. 1988), and is reprinted as Appendix B (14a-27a) to the Petition For Writ Of Certiorari.

The opinion of the Interstate Commerce Commission relied upon by the District Court and the Court of Appeals was served on January 19, 1988 at *Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.*, Docket No. MC-C-10961. The opinion is unreported, and is reprinted as Appendix C (28a-44a) to the Petition For Writ Of Certiorari.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief For The Petitioner.

## STATUTES INVOLVED

*49 U.S.C. §10701 Standards For Rates, Classifications, Through Routes, Rules, And Practices*

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable . . . .

*49 U.S.C. §10761 Transportation Prohibited Without Tariff*

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

## COUNTERSTATEMENT OF THE CASE

This proceeding was instituted on January 8, 1985 by the filing of a complaint with the United States District Court for the Western District of Missouri, Western Division, by Maislin Industries, U.S., Inc. ("Maislin"). Also named as plaintiffs in the complaint were Quinn Freight Lines, Inc. ("Quinn"); Gateway Transportation Co., Inc.; Richmond Cartage Corporation; and Maislin Transport of Delaware, Inc., each of which were divisions or subsidiaries of Maislin and were interstate common carriers of property under certificates issued by the Interstate Commerce Commission ("ICC"). Maislin and its divisions or subsidiaries are debtor and debtor-in-possession in Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division. (Pet. App. 28a)<sup>1</sup>

The complaint alleged that Primary Steel, Inc. ("Primary") underpaid Maislin for 1,081 of Primary's shipments of steel products transported by Maislin's division or subsidiary, Quinn, during the period of January, 1981 through November, 1983, by the sum of \$187,923.36, plus interest and costs.<sup>2</sup> Maislin's claim for undercharges was based on its contention that despite the fact that Primary had, prior to the bankruptcy, timely paid all charges billed to it at rates agreed upon by the parties, those rates were inapplicable under tariffs filed with the ICC pursuant to 49 U.S.C. §10761(a). Thus, the claimed undercharges represented the difference

<sup>1</sup> "Pet. App." refers to the appendices to the printed Petition For Writ Of Certiorari filed by the Petitioners on October 16, 1989. "JA" refers to the printed Joint Appendix filed herewith. "R" refers to the Joint Appendix containing the record filed with the Court of Appeals. "Pet. Brief" refers to the Brief For The Petitioner.

<sup>2</sup> References to the carrier that transported the shipments will be "Maislin", "Quinn/Maislin" or "Quinn", as appropriate.

between the rates negotiated by the parties and paid by Primary, and the tariff rates assessed by Maislin two or more years after the shipments took place. (Pet. App. 30a)

On March 22, 1985, pursuant to 49 C.F.R. §1111.1, *et seq.*, Primary instituted a formal complaint proceeding before the ICC at Docket No. MC-C-10961 alleging, *inter alia*, that the rates sought to be applied to the 1,081 shipments by Maislin were unreasonable, unlawful and unjust, in violation of 49 U.S.C. §10701(a), and that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed constituted an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §10701(a). (Pet. App. 33a)

Primary then filed a motion on April 2, 1985 with the District Court requesting that under the doctrine of "primary jurisdiction" the proceeding be referred to the ICC for a determination of the reasonableness and applicability of Maislin's tariffs, and the assessed freight rates and practices thereunder, at issue in the complaint. Maislin opposed the motion arguing that the equitable defenses raised by Primary were invalid as a matter of law, and referral to the ICC would serve no useful purpose.

The District Court, by order entered on September 3, 1985, granted Primary's motion and ordered that the issues and controversy raised in the complaint be referred to the ICC for determination. The referral was grounded on the application of the doctrine of primary jurisdiction, and the determination by the District Court that the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted and billed was the particular type of controversy that should be resolved by the application of the ICC's special competence, expertise and administrative discretion. (JA 5-8)

The ICC served its decision on January 19, 1988, and relying on its earlier decision in *National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates I*"), concluded that it would be an unreasonable practice under 49 U.S.C. §§10701(a) and 10761(a) to require Primary to pay the claimed undercharges. (Pet. App. 43a-44a) *Negotiated Rates I* was a rulemaking proceeding wherein the ICC adopted a policy statement holding that in the highly competitive environment following the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, which amended the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*, under certain circumstances the filed rate doctrine does not prohibit the assertion of equitable defenses.<sup>3</sup>

In applying *Negotiated Rates I*, the ICC made extensive factual findings that Maislin's division or subsidiary, Quinn, over a continuing period of time offered Primary transportation at various quoted rates which Primary accepted; that based on Quinn's representations Primary reasonably relied on Quinn to publish the quoted rates with the ICC pursuant to 49 U.S.C. §10761(a); that Quinn's failure to properly publish the quoted and agreed upon rates in tariffs, should under the circumstances, preclude Quinn's later collection of undercharges; that there was no evidence that Primary agreed to pay more than the amount Quinn originally quoted and billed for each shipment; that there was no evidence that Quinn even demanded additional amounts

<sup>3</sup> The ICC in a later decision in *National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (served June 29, 1989) ("*Negotiated Rates II*"), supplemented the earlier decision and reiterated that the rate filing requirements under 49 U.S.C. §10761(a) remain in effect but also held that the assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631.

over the amounts billed at any time during the business relationship with Primary; that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services performed; and that the amounts were reached as the result of negotiation between the parties, and because full payment was made by Primary, Quinn was equitably entitled to collect no further charges from Primary. (Pet. App. 36a-43a) Because of the finding of an unreasonable practice in violation of 49 U.S.C. §10701(a), the ICC did not address the reasonableness of the higher rate levels claimed by Maislin.

Subsequently, Primary moved for summary judgment requesting that the District Court afford substantial deference to, and affirm, the ICC's decision. (R 30a-32a) Maislin also moved for summary judgment contending that the ICC's decision was merely an advisory opinion and was contrary to law. (R 469a-472a) The District Court, by memorandum and order filed on July 22, 1988, granted summary judgment for Primary concluding that the ICC's determinations that a negotiated rate existed and that the collection of the undercharges would be an unreasonable and unlawful practice, were supported by substantial evidence and should be affirmed. (Pet. App. 25a)

On August 19, 1988, Maislin filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit ("Court of Appeals"). The ICC, upon motion, was permitted to intervene in support of Primary. Following the submission of briefs and oral argument, on July 17, 1989 the Court of Appeals issued an opinion affirming the judgment and conclusions of the District Court.

In the opinion, the Court of Appeals determined that referral of the proceeding by the District Court to the ICC was correct, and that the issue of the reasonableness of Maislin's billing practices was within the ICC's

primary jurisdiction. (Pet. App. 5a-7a) Finding that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practices provision of 49 U.S.C. §10701(a), the Court of Appeals concluded that the ICC's change in policy and consideration of equitable defenses was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act. (Pet. App. 7a-9a) The Court of Appeals also found that the ICC's consideration of equitable defenses<sup>4</sup> was a reasonable attempt to harmonize the competing provisions of 49 U.S.C. §10701(a), which mandates that tariff rates and practices be reasonable, with the provisions of 49 U.S.C. §10761(a), which mandates the collection of tariff rates. (Pet. App. 9a) The Court of Appeals also disregarded Maislin's argument that the ICC's decision was merely an "advisory" decision, finding that the ICC had recognized that its responsibility was to evaluate the reasonableness of a practice, while the District Court retained the authority to structure a proper remedy. (Pet. App. 12a) Lastly, the Court of Appeals determined that Maislin's claim for prejudgment interest was not required to be addressed, because Primary was not liable for the claimed undercharges. (Pet. App. 12a-13a)

<sup>4</sup> In *Negotiated Rates II*, the ICC clarified its previous position in *Negotiated Rates I*, stating that "[w]hile our unreasonable practice rules are 'equitable' in the sense that they are intended to result in decisions that are fair to the parties, they are based upon the legal requirements of §10701 . . . ." 5 I.C.C.2d at 628, n. 11.

## SUMMARY OF ARGUMENT

At issue in the proceeding before the Court of Appeals was whether Maislin's billing practice of assessing and rebilling higher rates than those originally quoted to secure Primary's business, and confirmed and billed to Primary, and which were assessed approximately two years after the last such shipment, was reasonable and enforceable. The Court of Appeals correctly affirmed the District Court's referral of the issue to the ICC, under the doctrine of primary jurisdiction, for the determination of the reasonableness of Maislin's billing practice pursuant to 49 U.S.C. §10701(a). The District Court's referral has been the traditional method utilized by courts for the determination of such issues arising under 49 U.S.C. §10701(a).

The Court of Appeals also correctly affirmed the District Court's adoption of the ICC's decision determining that it would be an unreasonable practice pursuant to 49 U.S.C. §10701(a) to require Primary to pay the claimed undercharges (representing the difference between the rates negotiated by the parties and the tariff rates). The ICC, in exercising upon referral its special competence, expertise, and administrative discretion, and acting within its primary jurisdiction, provided a reasoned and correct statutory construction of 49 U.S.C. §§10701(a) and 10761(a). The ICC's statutory construction also provided a reasonable accommodation between competing sections of the Interstate Commerce Act. Lastly, the Court of Appeals did not commit error in finding that the District Court properly accorded substantial deference to the ICC's decision. Thus, the decision of the Court of Appeals is fully consistent with established federal law and should be affirmed in its entirety.

## ARGUMENT

**1. The Court Of Appeals Correctly Found That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) To Determine The Reasonableness Of A Motor Common Carrier's Billing Practices.**

Maislin's principal argument is that the Court of Appeals committed error by disregarding past precedents in affirming the District Court's acceptance of the ICC's determination that Primary is permitted to raise equitable defenses to the application of the filed rate doctrine, where Primary reasonably relied on Maislin's rate quotes and its assurances that lawful tariffs had been filed. (Pet. Brief 9-12)<sup>5</sup> The Court of Appeals thoroughly reviewed the precedents and the pertinent provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §10101, *et seq.*, and correctly rejected this same argument, by concluding that the decision on referral demonstrated the ICC's continuing evolution of its view on the relevance of negotiated rates in determining the reasonableness of a motor common carrier's billing practices under 49 U.S.C. §10701(a). (Pet. App. 7a-11a)

### A. The Interstate Commerce Commission Proceeding.

The ICC, upon referral by the District Court, considered the issues of whether Maislin's widespread practice of assessing and rebilling higher rates than those originally quoted to secure Primary's business, and confirmed and billed to Primary, constituted an unreasonable practice in violation of 49 U.S.C. §10701(a), and whether the filed rate doctrine barred the consideration of that equitable defense against Maislin's claim for undercharges.

<sup>5</sup> The filed rate doctrine refers to the requirement of 49 U.S.C. §10761(a) that a motor common carrier must collect the rate published in the tariff.

In considering these issues the ICC exhaustively reviewed the evidence submitted by the parties.<sup>6</sup> The evidence showed that employees or agents of Quinn/Maislin, as an inducement to secure the substantial business of Primary, orally quoted to Primary rates for the transportation of the shipments of steel products at issue. These quoted rates were discussed by the parties at various times, in personal visits and in telephone calls, throughout the period of 1979 through 1983. Following the completion of the negotiations between the parties, the quoted rates were accepted by Primary, and confirmed in writing by Quinn. Primary was subsequently billed by Quinn and paid in full to Quinn, for the shipments at the agreed upon rates. (R 141a-144a; 153a-157a)<sup>7</sup>

Maislin had contended in the evidence submitted to the ICC that Primary owed the amount of \$187,923.36, plus interest and costs, for the shipments, alleging that the higher rates assessed were those filed in tariffs with the ICC during the time period of the shipments. Maislin also contended that the rates quoted by Quinn and agreed to by the parties were irrelevant because those rates had not been properly filed by Quinn in tariffs with the ICC. (R 306a-316a)

In response, Primary requested that the ICC find payment of the alleged undercharges unreasonable, because Primary in good faith relied upon the representations of Quinn's employees or agents and believed that Quinn would do whatever was necessary to comply with the ICC's rules as to rate tariff publication. Also based on the representations of Quinn's employees

<sup>6</sup> The Court of Appeals noted that the parties did not challenge the ICC's findings of fact. (Pet. App. 12a)

<sup>7</sup> Primary has already billed its customers based in part upon the transportation costs, and has no way to recoup additional compensation from its customers to pay the undercharges. (R 138a, 403a)

or agents, Primary utilized Quinn instead of other motor carriers available (at the same or similar rates) for the shipments. (R 141a-144a; 153a-157a)<sup>8</sup>

After reviewing the evidence, the ICC determined that negotiated rates existed for the shipments at issue.

It is clear that negotiations took place between Primary, represented either by Mr. Costello or by another person on his staff, and Quinn, represented by Mr. McGowan, prior to movement of the shipments in question. Further, there is evidence of offers, acceptances, and approvals by the involved parties. (Pet. App. 36a)

The ICC further determined that there was a reasonable basis for Primary to rely on the representations made by Quinn's representatives.<sup>9</sup>

<sup>8</sup> During the period of the shipments at issue, Pittsburgh & New England Trucking Co. ("P&NE"), a competitor of Quinn, maintained comparable rates filed in tariffs with the ICC. Primary could have continued to use P&NE to secure the same rates as those quoted, confirmed and billed by Quinn. (R 169a) As a result, Primary received no rate advantage or preference by using Quinn, because the rates were offered by other carriers and were readily available to all similarly situated shippers. See, e.g., *Thermofil, Inc. v. Jones Transfer Company*, 355 I.C.C. 828 (1977).

<sup>9</sup> Maislin contends that the ICA gives shippers pre-shipment protections to verify that a quoted rate is, in fact, a legal rate, including the availability of tariffs for inspection at the offices of the ICC. (Pet. Brief 25) The record shows that this contention has no merit. The evidence submitted by Primary's expert witness, David W. Donley, demonstrated that had Primary attempted to inspect and review the pertinent tariffs prior to moving the shipments under the quoted rates, Primary would have been faced with an extremely complex and convoluted scheme of overlapping and superceding tariff publications, including various class rate bureau tariffs and 57 separate commodity rate publications. In fact, it would have been virtually impossible for Primary to verify with legal certainty that the particular rates quoted by Quinn/Maislin had been filed with the ICC. (R 167a-168a; 420a-421a)

(Footnote continued on following page.)

The evidence of record shows that Mr. McGowan negotiated on behalf of Quinn and offered Primary rates that were approved in each instance by Mr. Pardus, Quinn's director of rates. Primary's Mr. Costello understood that all rates offered to Primary were approved by Quinn's Adamsburg office. Further, a written rate sheet that confirmed these rates was given to Primary. In these circumstances, we conclude that Primary could legitimately rely on representations made by a carrier's local agent and approved by the carrier's director of rates. Clearly, the quoted rates were established by individuals whose positions and actions reasonably induced the shipper's reliance on the arrangement. [footnote omitted] (Pet. App. 40a)

The ICC also determined that Quinn's practice of soliciting traffic by the use of negotiated rates was a widespread practice.

... Maislin's use of local, commissioned agents to obtain traffic was apparently a widespread practice. In other similar proceedings before the Commission involving Maislin, over 40 shippers, and many thousands of shipments, [footnote omitted] the evidence shows that it was Maislin's practice to use local agents to solicit traffic for the Maislin carriers and negotiate rates, subject to approval from Maislin management. (Pet. App. 41a)

(Footnote continued from preceding page.)

In addressing this issue, the ICC concluded that Primary's lack of knowledge of tariff filing requirements did not negate the existence of a negotiated rate, nor did it preclude the ICC from applying the policy announced in *Negotiated Rates I*. (Pet. App. 42a-43a)

In *Negotiated Rates II*, the ICC specifically noted that "[h]undreds, or even thousands, of individual motor common carrier rates are now negotiated daily. Moreover, reduced tariff rates may now be filed to become effective on one day's notice. [footnote omitted] In these circumstances, it would be extremely difficult for shippers to determine, prior to an initial movement, whether the agreed-upon rate is actually on file (or what rates their competitors are paying)." *Id.* at 633.

In finding that pursuant to 49 U.S.C. §10701(a) Maislin was not legally permitted to collect the alleged undercharges of \$187,923.26 (the difference between the negotiated rates and the tariff rates), the ICC concluded:

The evidence, then, discloses that, over a continuing period of time, Quinn offered Primary transportation at the involved rates and that Primary accepted those offers. Primary relied on Quinn to implement properly the quoted rates. Quinn's failure to do so, despite Primary's lack of vigilance, should, in these circumstances, preclude Quinn's later collection of undercharges. There is absolutely no evidence that complainant agreed to pay any more than the amount defendant originally quoted and billed for each shipment. There is no evidence that Quinn ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary. We find that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full payment was made by complainant, defendant is equitably entitled to collect no more. (Pet. App. 43a)

Relying on *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), and its decision in *Negotiated Rates I*,<sup>10</sup> the ICC concluded that the filed rate doctrine did not bar the consideration by the ICC of equitable defenses against Maislin's claim for undercharges. The ICC further found that Maislin's billing practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary, constituted an unreasonable practice in violation of 49 U.S.C. §10701(a), as follows:

... (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom [Primary] legitimately could rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the rate quotation.

... In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates. (Pet. App. 43a-44a)

<sup>10</sup> In *Negotiated Rates I* and *Negotiated Rates II*, the ICC declared that it would find the application of filed rates unreasonable when the shipper and the carrier have engaged in "... a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates." *Negotiated Rates II*, 5 I.C.C.2d 628, n. 11. The findings of the ICC, and the record supporting the findings, clearly demonstrated that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary, constituted an unreasonable practice.

**B. The Interstate Commerce Commission's Determination That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) In Determining The Validity Of Undercharges Was Fully Supported By Precedent.**

The ICA requires that a motor common carrier collect the rate published in its tariffs. See 49 U.S.C. §10761(a). The traditional view has been that rates agreed to by the parties were not particularly relevant in determining the reasonableness of rates. Moreover, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. See, e.g., *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 495 (1915). The filed rate doctrine was strictly enforced to prevent intentional misquotations or secret discounts to carriers seeking to discriminate in favor of particular shippers. *Western Transp. Co. v. Wilson and Co., Inc.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982); *Negotiated Rates I*, 3 I.C.C.2d at 106 (JA 21).

In recent years the ICC has reexamined the issue. In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom.*, *Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the Eleventh Circuit affirmed the ICC's decision to order the waiver of undercharges pursuant to 49 U.S.C. §§10701(a) and 10704(a)(1) based on a rail carrier's rate misquotation. The case arose from a proceeding before the ICC where the shipper contended that the railroad intentionally misquoted a rate to the shipper, and that the attempt by the railroad to collect resultant undercharges from the shipper was an unreasonable practice. The ICC specifically found that the shipper did not pay the applicable tariff rate, but determined that under the circumstances presented the collection of undercharges in itself was an unreasonable practice. The ICC also reversed its prior position that the equitable defense of a carrier rate misquotation was not a defense to a claim for undercharges by a carrier. The

Eleventh Circuit found that the ICC was "...both justified and within its jurisdiction", and that "[n]othing prohibits the ICC from changing its policy on enforcing the 'unreasonable practice' provision of section 10701(a)". *Id.* at 638.

Subsequently, the ICC in *Negotiated Rates I* adopted a policy statement providing that the filed rate doctrine does not necessarily bar the consideration by the ICC of equitable defenses against claims for undercharges. The ICC noted in the decision that the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, had "dramatically altered the competitive atmosphere of the motor carrier industry", resulted in "intense, new competition," and required "carriers to price competitively and on extremely short notice" in order to retain or obtain new traffic. *Id.* at 105 (JA 19). As a result, the ICC found that shippers are required to daily negotiate "hundreds, or even thousands" of individual rates, and it is "extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file". *Id.* at 105 (JA 20).<sup>11</sup> The issue, as summarized by the ICC, was:

... whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff). [footnote omitted] We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates

<sup>11</sup> In the ICC's later decision in *Negotiated Rates II*, the ICC explained the magnitude of the increase in competition resulting from the passage of the MCA. In 1979, there were approximately 17,000 regulated motor common carriers. Due to relaxed entry requirements resulting from the MCA, the number of regulated motor common carriers had increased in 1989 to more than 39,000. Thus, as noted by the ICC, "...today, shippers do not depend upon regulation to protect them from discriminatory pricing; in most circumstances, there are simply more competitive options." *Id.* at 632.

should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach. *Id.* at 105-06 (JA 20).

Concluding that permitting equitable defenses comports with the spirit of the MCA, the ICC stated that upon referral from a court it would decide whether, under all "relevant circumstances", the collection of undercharges would be an unreasonable practice. *Id.* at 107 (JA 22).<sup>12</sup>

The ICC's establishment in *Negotiated Rates I* of a new procedure for determining the reasonableness of a motor common carrier's billing practices pursuant to 49 U.S.C. §10701(a), was not an attempt by the ICC to change or eliminate the filed rate doctrine embodied in 49 U.S.C. §10761(a). In fact, the ICC has always had the jurisdiction to address the question of the unreasonable collection of undercharges; *Negotiated Rates I* was merely a further step in the continuing evolution of the ICC's view of the relevance of negotiated rates in determining the reasonableness of a motor common carrier's billing practices. *Negotiated Rates I*, 3 I.C.C.2d at 106-107 (JA 21-22).

<sup>12</sup> Maislin, citing *Negotiated Rates I*, 3 I.C.C.2d at 107 (JA 22), argues that the ICC's decision in this proceeding was merely "advisory" in nature and the District Court was not required to follow the ICC's decision. (Pet. Brief 18) The Court of Appeals, in dismissing this issue, stated that "[v]iewed in context, the ICC simply recognized the allocation of responsibility between it and the courts, and that after it evaluates the reasonableness of a practice, the courts retain authority to structure a proper remedy. Maislin's semantic argument is not persuasive to us. See *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960) (ICC decision finding rates unreasonable was "by no means a mere 'advisory option'")." (Pet. App. 12a) In *Negotiated Rates II*, the ICC clarified its previous position and stated that negotiated rate determinations are not advisory opinions, but result in "binding and dispositive" orders. *Id.* at 624.

In past instances, the ICC and the courts have recognized that the harsh realities of the filed rate doctrine can be ameliorated by equitable considerations. For example, the ICC has permitted deviations from tariff provisions where a notation required to be placed on shipping documents by the tariff had no bearing on the nature of the commodity or the service performed. See, e.g., *Standard Brands, Inc. v. Central R.R. of N.J.*, 350 I.C.C. 555, 558-59 (1974). Similarly, the ICC has found that enforcing a notation provision required by a tariff, thereby rendering inapplicable a lower (commodity) rate in favor of a higher (class) rate, would result in an unreasonable practice in violation of 49 U.S.C. §10701(a). See, e.g., *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d 475, 483 (7th Cir. 1989). See also *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638 (ICC refused to enforce a railroad's tariff rate in circumstances where the shipper had relied on the carrier's representation that a significantly lower rate would apply to its transportation).

Recently, the Ninth Circuit in *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990), relying in part on the Court of Appeals' decision in this proceeding, affirmed the ICC's decision on referral that the collection of undercharges by a bankrupt motor carrier, under a billing collection scheme similar to the Maislin practice, was an unreasonable practice pursuant to 49 U.S.C. §10701(a).<sup>13</sup> See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), a case involving a similar factual situation as this proceeding and argued before the Eighth Circuit on the same day as this proceeding. The District Court had referred the proceeding to the ICC, but citing the filed rate doctrine

<sup>13</sup> By order filed February 16, 1990, the Ninth Circuit stayed the issuance of its mandate pending the resolution of this proceeding.

refused to affirm the ICC's decision that the collection of undercharges was an unreasonable practice. The Eighth Circuit, relying on the decision in this proceeding, reversed the District Court and held that the reasonableness of the carrier's billing practice was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision. *Id.* at 548.<sup>14</sup>

Lastly, Maislin argues that *Louisville & Nashville R.R. Co. v. Maxwell*, *supra* and *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922 (1986), reaffirmed the validity of the filed rate doctrine by prohibiting any deviation from the terms of a filed tariff. (Pet. Brief 11) The Court of Appeals considered this argument and properly found that Maislin's reliance on those decisions was untenable.<sup>15</sup>

<sup>14</sup> In *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom.*, *Supreme Beef Processors, Inc. v. Yaquinto*, the Fifth Circuit held that under the filed rate doctrine, a motor carrier which had negotiated a rate with a shipper for less than the tariff rate could collect undercharges. However, unlike this proceeding, the *Caravan Refrigerated* decision did not involve a referral under the primary jurisdiction doctrine to the ICC and the subsequent consideration of the ICC's decision following the referral.

<sup>15</sup> Maislin also argues that *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), reaffirmed the validity of the filed rate doctrine. (Pet. Brief 11) That case involved a tariff rule challenged by motor carrier trade associations under which certain freight forwarders could agree to provide services to shippers at unpublished rates determined by averaging prior charges to those shippers. The District of Columbia Circuit, in finding that the tariff rule did not meet the filing requirements of 49 U.S.C. §10761(a), reaffirmed that Section 10761(a) requires that a carrier must file its rates with the ICC. However, the decision did not involve the issue of equitable defenses to undercharge claims, and did not imply that Section 10761(a) permits motor carriers to engage in unlawful and unreasonable practices. *Id.* at 879-80.

... In *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 415-16. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added).

(Pet. App. 9a)

In summary, the Court of Appeals, citing the *Seaboard System* and *Negotiated Rates I* decisions with approval, properly concluded that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practices provision of 49 U.S.C. §10701(a), that changed circumstances warranted reexamination by the ICC of its previous policy of refusing to consider equitable defenses, and that equitable defenses can be considered pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor common carrier's billing practices. These findings by the Court of Appeals are consistent with past precedents, comport with the pertinent provisions of the ICA, and should be affirmed by this Court.

## 2. The Determination Of The Reasonableness Of Petitioners' Billing Practice Under 49 U.S.C. §10701(a) Is Within The Interstate Commerce Commission's Primary Jurisdiction.

Maislin contends that the Court of Appeals committed error in finding that the issue of the reasonableness of Maislin's billing practice was an issue properly within the ICC's primary jurisdiction. Maislin further contends that this issue is a question of law and within the competence of the judiciary. (Pet. Brief 12-18) Both contentions are without merit.

The conclusion of the Court of Appeals, that under the doctrine of primary jurisdiction the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary was properly determined by the ICC, is fully supported by precedent.

This Court has considered the application of the doctrine of primary jurisdiction on various occasions and concluded that it should be exercised by the courts if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-06, 96 S.Ct. 1978, 1987-88 (1976). The doctrine should also be exercised over any matter that "... raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICA]." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65, 77 S.Ct. 161, 166 (1956). See also *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-32, 60 S.Ct. 325, 329 (1940).

The lower courts have also made clear that the issue of the reasonableness of a practice sought to be applied by a carrier in its tariff should be referred in the first

instance to the ICC for initial determination. As noted by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638, "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." See also *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d at 477; *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d at 1231; *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255, 261 (8th Cir. 1982).

Moreover, the majority of the Courts of Appeals that have been presented with similar claims for undercharges have determined that the reasonableness of a motor common carrier's billing practices falls within the primary jurisdiction of the ICC, and that the filed rate doctrine does not preclude referral to the ICC for resolution of those issues. See *West Coast Tank Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d at 1020-22 (9th Cir.); *Delta Traffic Service v. Appco Paper & Plastics*, 893 F.2d 472, 475 (2nd Cir. 1990). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 550 (8th Cir.) (District Court reversed based on the finding that the reasonableness of the carrier's billing practice was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision). But see *Matter of Caravan Refrigerated Cargo, Inc.*, *supra* (District Court's denial of referral affirmed on finding that a defense to a carrier undercharge action based on the unreasonableness of failing to file negotiated rates does not raise technical or complex issues requiring the expert administration of the ICC).<sup>18</sup>

The District Court's referral of the issue of the reasonableness of Maislin's billing practice (i.e., Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary)

<sup>18</sup> There are numerous cases pending before courts and the ICC (see Pet. App. 45a-53a) and "millions of dollars" are involved in those cases. *Negotiated Rates II*, 5 I.C.C. 2d at 636.

to the ICC has been the traditional method utilized by courts for the determination of reasonableness issues arising under 49 U.S.C. §10701(a). Such issues are complicated matters which Congress entrusted to the ICC, and which the courts have long recognized to be properly determined by the ICC's special competence and expertise. *United States v. Western Pacific R.R. Co.*, 352 U.S. at 63-64, 77 S.Ct. at 164-65; *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 549 (the "ultimate statutory issue," the reasonableness of a carrier's billing practices, "involves inherently factual inquiries" within the special competence of the ICC).

The recognition by the Court of Appeals that the decision of whether to permit Maislin to collect undercharges directly involved the reasonableness of its billing practice, and the Court of Appeals' affirmance of the District Court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practice, are fully supported by precedent and should be affirmed by this Court.

### 3. The Interstate Commerce Commission's Decision Is A Reasonable Accommodation Between Competing Sections Of The Interstate Commerce Act.

The essence of Maislin's position in this proceeding is that the filed rate doctrine requires the application of the provisions of 49 U.S.C. §10761(a) in a mechanical and slavish manner despite the fact that a motor common carrier may have engaged in an unreasonable practice. (Pet. Brief 9-12) By characterizing the dispute as only involving rate reasonableness, and refusing to recognize that the Court of Appeals, the District Court, and the ICC have all properly recognized that the dispute involves the issue of the reasonableness of Maislin's billing practice, Maislin cavalierly argues that the enforcement of the unreasonable practices doctrine must always be subordinated to the enforcement of the filed rate doctrine.

In interpreting a statute an agency and the courts must avoid absurd results and deal with internal inconsistencies within a statute. See *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527 (1981); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061 (1978). They must also seek to adopt a construction which gives effect to all of a statute's provisions. See *Jarecki v. G. D. Searle & Co.*, 367 U.S. 306, 307-08, 81 S.Ct. 1579, 1582 (1961); *Darling v. Bowen*, 878 F.2d 1069, 1076 (8th Cir. 1989).

The filed rate doctrine embodied in 49 U.S.C. §10761(a), and the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a), are both mandated by the ICA. Each of these statutory sections control in appropriate circumstances and must be given effect, and when the sections conflict the ICC is the proper forum for the resolution of such a dispute.

The Court of Appeals squarely addressed this issue, finding that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act elevating this section over section 10701, which requires that tariff rates be reasonable." (Pet. App. 9a). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548. In the event of a dispute as to the application of the two statutory sections, the proper authority to harmonize these competing provisions is the ICC. *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d at 1027; *Seaboard System R.R. Co. v. United States*, 794 F.2d at 638; *Negotiated Rates II*, 5 I.C.C. 2d at 627.

Under this approach, the ICC is exercising its authority to consider all of the circumstances, including equitable defenses, to determine the reasonableness of the billing practices under 49 U.S.C. §10701(a), but it is not abolishing the requirement in 49 U.S.C. §10761(a) that a carrier must charge the tariff rate. *West Coast*

*Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d at 1027; *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548; *Negotiated Rates I*, 3 I.C.C.2d at 103 (JA 16-17).

The Court of Appeals properly determined that the ICC decision "represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act". (Pet. App. 12a) To have found otherwise would have produced an absurd result and improperly granted validity to Maislin's attempt to give no effect, and in essence to write out of the ICA, the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a).

#### 4. The Statutory Provisions Of The Interstate Commerce Act Permit The Interstate Commerce Commission's Consideration Of The Unreasonable Practices Provision of 49 U.S.C. §10701(a).

Maislin argues that the ICC does not have the authority to change its policy concerning the filed rate doctrine because the MCA contained no specific statutory provisions authorizing such a change. (Pet. Brief 18-24) This argument is without merit.

It is well-settled that the ICC may alter its past interpretation, and if the ICC in resolving an issue departs from its settled precedent, it must adequately explain its change in policy. See, e.g., *Seaboard System R.R. Co. v. United States*, 794 F.2d at 639; *Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). A court must accept such a change if the ICC's new interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782 (1984); *General American Transp. Corp. v. I.C.C.*, 872 F.2d 1048, 1059 (D.C. Cir. 1989), suggestion for rehearing *en banc* denied, 883 F.2d 1029 (1989), *cert. denied* on February 20, 1990. Moreover, an administrative agency's interpretation of its own regulations is entitled to substantial deference. *Marathon*

*Oil Co. v. United States*, 807 F.2d 759, 765 (9th Cir. 1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1593 (1987). As stated by this Court in *American Trucking Ass'ns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618 (1967):

... the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice ... Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 953, 104 S.Ct. 2160 (1984).

Based on the "relaxed regulatory requirements" in the MCA, and the ICC's determination that the enforcement of the unreasonable practices provision of 49 U.S.C. §10701(a) would not undermine the anti-discrimination goals of the filed rate doctrine, the Court of Appeals properly concluded that the ICC's new interpretation permitting the assertion of equitable defenses was reasonable.

... Here, the ICC evaluated the effects of the relaxed regulatory requirements in the Motor Carrier Act of 1980. It concluded that giving effect to negotiated rates, through its jurisdiction to enforce "reasonable practices" under section 10701, can avoid injustice without undermining the anti-discrimination goals of the filed rate doctrine. *Negotiated Rates*, 3 I.C.C.2d 99. The ICC further explained that in light of the regulatory changes the "inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate

illegally between the shippers." *Seaboard*, 794 F.2d at 638 (quoting *Buckeye*, 1 I.C.C.2d 767). We believe that the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act. (Pet. App. 12a)

Citing *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904 (1959), Maislin states that those decisions left purchasers of motor common carriage without any remedy whatsoever with respect to unreasonable rates on past shipments. Maislin then argues that the statutory remedy created by Congress with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965, only provided a reparations remedy for unreasonable rates, and did not provide a cause of action or defense for an unreasonable carrier practice. (Pet. Brief 18-24)

This Court in *T.I.M.E.* determined that the Motor Carrier Act of 1935 did not provide a reparations remedy for a shipper to recover for past unreasonable practices or rates. *Id.* at 470, 79 S.Ct. at 908. However, in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 83 S.Ct. 157 (1962), decided three years later, the effect of *T.I.M.E.* was narrowed. In *Hewitt-Robins*, a shipper brought an action against a carrier and asserted that the carrier's practice of billing the shipper at a higher interstate rate rather than at a lower intrastate rate was unreasonable. In reversing the Court of Appeals, this Court held that the prior decision in *T.I.M.E.* was not controlling and confirmed that a shipper may assert the statutory unreasonableness of past motor carrier practices in court proceedings, and then obtain referral of such issues to the ICC for substantive determination. *Id.* at 85, 83 S.Ct. at 158. This Court also noted that similar assertions of the past unreasonableness of motor carrier rates were not permitted under the then existing law,

because Congress had created an alternate remedy of protest and suspension of rates prior to their effectiveness, and had been silent as to the survival of a post-shipment damage remedy. *Id.* at 87, 83 S.Ct. at 159.

In 1965, Congress reversed the prohibition pertaining to rate unreasonableness by amending the ICA. Pub. L. 89-170, 79 Stat. 651, September 6, 1965 (amending then 49 U.S.C. §304(a)). Contrary to Maislin's contention, by this action Congress restored the existence of parallel remedies in post-shipment damage litigation involving either unreasonable rates or unreasonable practices which had existed prior to *T.I.M.E.* and *Hewitt-Robins*.<sup>17</sup>

When the ICA was recodified in 1978, Pub. L. 95-473, 92 Stat. 1337, October 17, 1978, unitary provisions were created to continue post-shipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 U.S.C. §§10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1) and 11706(c)(2).<sup>18</sup> As a result, 49 U.S.C. §11705(b)(3) provides the ICC with the authority to award reparations "resulting from the imposition of

<sup>17</sup> This conclusion is supported by the legislative history. The provision "... restore[d] a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case... and would not affect in any way the right of shippers to recover damages for misrouting under the *Hewitt-Robins* doctrine." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2927.

<sup>18</sup> This combination of prior separate provisions in the recodification merely corrected variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical Revision Notes, following 49 U.S.C. §10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. See also *Purolator Courier Corp. v. I.C.C.*, 598 F.2d 225, 227, n.5 (D.C. Cir. 1979) (enactment of the recodified ICA was not intended to make substantive changes to the original ICA, but the new language may serve as a guide to the meaning of the original ICA).

rates for transportation or service." This provision is certainly broad enough to include Primary's claim that Maislin's billing practice is an unreasonable practice pursuant to 49 U.S.C. §10701(a). Thus, the referral procedures are identical whether a shipper in a court proceeding pleads a defense of unreasonable rates or unreasonable practices, and this Court should disregard Maislin's contentions to the contrary.

**CONCLUSION**

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed in its entirety.

Respectfully submitted,

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